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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re the Marriage of KATHLEEN and KIRK BROWN.	
KATHLEEN BROWN, Respondent, v. KIRK BROWN, Appellant.	C038617 (Super. Ct. No. 95FL01959)

This is a judgment roll appeal from a judgment entered on reserved property issues in the dissolution of the marriage of Kathleen (wife) and Kirk (husband) Brown.

Husband owned certain real property in Galt, California before marriage, and entered into a premarital agreement with wife in which the parties agreed husband would retain the property as his separate property after marriage. However,

after the marriage husband deeded the property to himself and wife as joint tenants. The trial court found wife had a community property interest in the property.

On appeal husband argues the deed was insufficient to transmute the property from separate to community property, and any presumption that the property was community was rebutted by the premarital agreement. We shall affirm the judgment and award wife her attorney fees on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Husband and wife were married in July 1990. On the day of their wedding they signed a premarital agreement in which wife agreed husband's real property in Galt, California (Galt property) would remain his separate property throughout the marriage. The agreement stated it was "intended to preserve ownership and prevent the division or loss of property in the event of dissolution." The agreement stated that it could be modified or changed with the written consent of both parties at their discretion.

On August 9, 1991, husband deeded the Galt property to himself and wife as joint tenants. The deed stated, in part, that husband "hereby GRANT(S) to Kirk W. Brown and Kathleen M. Brown, husband and wife, as joint tenants the following described real property . . . ."

Trial on the division of property issues was set for August 1998. In July 1998, husband submitted a statement of issues and contentions. In it, he asserted he was entitled to

reimbursement for his separate property contribution to the acquisition of the Galt property, which he stated, "became a community property home."

On August 21, 1998, a trial was held and the trial court issued a minute order which found wife's interest in the Galt property to be a community property interest of $50,500. In February of the next year, husband brought a motion to set aside the "judgment" pursuant to Code of Civil Procedure section 473, subdivision (b), because of "new evidence available to the court at this time."[1] Although the motion did not state what the new evidence was, husband attached a declaration in support of the motion claiming he transferred the Galt property's title to wife because the bank refused to loan him money for a house unless the Galt property was held in both his and wife's name. He averred neither he nor wife ever intended to transmute the Galt property to community property. The court denied the motion, ruling husband had not shown any "mistake, inadvertence, surprise or excusable neglect."

Judgment was finally entered in the case on March 13, 2001, just five months shy of three years from the court's original minute order after trial. The record contains no statement of

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[1] Section 473, subdivision (b), provides in pertinent part: "The court may, upon any terms as may be just, relieve a party . . . from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

decision, and the sole findings contained in the judgment are: "1. The court finds the community property interest in the real property located at 12775 Woods Road, Galt, California is $101,000. [¶] 2. Husband to reimburse $50,500 to wife within 120 days, otherwise the real property is to be listed for sale. [¶] 3. Each party to pay their own attorney's fees and costs."

Husband moved for a new trial on March 27, 2001. He claimed, as he does here, the facts are undisputed, and the only issue is the improper application of Family Code section 2581.[2] The trial court denied the motion.

Husband appealed from the judgment filed March 13, 2001, and from the denial of the new trial motion. He did not appeal from denial of the Code of Civil Procedure section 473 motion.

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[2] References to a section are to the Family Code. Section 2581 states as follows: "For the purpose of division of property on dissolution of marriage or legal separation of the parties, property acquired by the parties during marriage in joint form, including property held in tenancy in common, joint tenancy, or tenancy by the entirety, or as community property, is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:

(a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

(b) Proof that the parties have made a written agreement that the property is separate property."

DISCUSSION

This is an appeal on the judgment roll alone. There is no reporter's transcript of the trial held August 21, 1998. If there is an error, it must appear on the face of the judgment roll before a reversal may be ordered. (*Utz v. Aureguy* (1952) 109 Cal.App.2d 803, 806-807; *Frazee v. Civil Service Bd. of City of Oakland* (1959) 170 Cal.App.2d 333, 334.) We shall conclude no error appears on the face of the judgment roll and the appeal is completely without substance.

For the purpose of dividing property on dissolution of marriage, it is presumed that property acquired by parties during the marriage in joint form is community property. (§ 2581.) This presumption may be rebutted by either a statement in the deed by which the property is acquired that it is to be separate rather than community property, or by a written agreement of the parties that the property is to be separate. (§ 2581.) Where the separate property of one spouse owned before marriage is placed in joint tenancy with the other spouse during the marriage, the property is "acquired by the parties during marriage" for the purpose of section 2581. (*In re Marriage of Neal* (1984) 153 Cal.App.3d 117, 124, disapproved on another point in *In re Marriage of Buol* (1985) 39 Cal.3d 751, 762-763, fn. 9.)

Though not clearly set forth as required by rule 14 of the California Rules of Court (requiring that each point be under a separate heading summarizing the point), husband's argument is

twofold. First, he argues the 1991 deed was insufficient to transmute the property from separate property to community property, and second, any presumption the property was community property was conclusively rebutted by the earlier premarital agreement.

I
Transmutation

Transmutation of property in the marital context is governed by section 852. As is applicable here, section 852 provides in pertinent part: "A transmutation of real or personal property is not valid unless made in writing by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected."

The Supreme Court has held the "express declaration" of section 852 is satisfied by a writing signed by the adversely affected spouse containing language "which expressly states that the characterization or ownership of the property is being changed." (*Estate of MacDonald* (1990) 51 Cal.3d 262, 272.)

We must determine whether the writing meets this test by referring to the writing itself, without resort to parol evidence. (*In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 588.) The grant deed states that husband "hereby GRANT(S)" the property to himself and wife "as joint tenants[.]" In *Estate of Bibb* (2001) 87 Cal.App.4th 461, the court held a grant deed using the same language as the deed at issue here was adequate

to transmute property from separate to community property under section 852. (*Id*. at pp. 468-469.) The court reasoned the word "grant" is the historically operative word for transferring interests in real property. (*Ibid*.) It concluded that without question the use of the word to convey real property into joint tenancy satisfied the "express declaration" requirement of section 852. (*Ibid*.)

Husband argues *Estate of Bibb, supra*, is distinguishable because it arose in the context of a surviving joint tenant as opposed to the marital dissolution context we face here. This is a distinction without a difference.

In *Estate of Bibb*, the issue was whether a grant deed purporting to transmute the husband's separate property into an interest owned as joint tenants by the husband and wife was a sufficient "express declaration" under section 852. (87 Cal.App.4th at p. 465.) Husband's child from a prior marriage challenged the grant deed after the husband's death. (*Id*. at p. 464.) There was no different standard for determining whether the document satisfied the requirements of section 852 by reason of the fact it was raised in a probate proceeding.

Husband quotes language from 5 Miller & Starr, California Real Estate (3d ed. 2000) section 12:42, page 101, to the effect the presumption does not apply "when the dispute arises in proceedings other than dissolution, such as a dispute by one spouse with the estate or an heir of the deceased spouse, or when there is an issue of the distribution of assets on the

death of a spouse." (Fns. omitted.) However the presumption discussed in the passages husband quotes is the presumption of section 2581 that property acquired in joint title is presumed to be community property. This has nothing to do with whether a particular document is sufficient to effect a transmutation of property.

II
Community Property Presumption

Husband argues that if the 1991 deed effected a transmutation of the property, the presumption that the property was community property was conclusively rebutted by the written premarital agreement. We disagree.

A later instrument supercedes an earlier one wherever they are inconsistent. (*Tremayne v. Striepeke* (1968) 262 Cal.App.2d 107, 114; 14 Cal.Jur.3d (1999) Contracts, § 191, fn. omitted.) The premarital agreement signed by the parties provided for amendment or modification, thus the trial court must have found the deed superceded the earlier premarital agreement.

Husband cites two cases for the proposition a premarital agreement may rebut the presumption of community property. In the first case, *In re Marriage of Dawley* (1976) 17 Cal.3d 342, 357, the parties agreed before marriage that their earnings and other property acquired during the marriage would be held as separate property. In that case the premarital agreement specifically anticipated any property acquired after the marriage would be held separately. The parties did not purchase

real property in both their names, but maintained everything as separate property. (*Id*. at p. 356.)

Here, the premarital agreement contains no express contemplation of property to be acquired in the future, thus this is not a case in which an earlier premarital agreement applies to later acquired property. The agreement applies to separate property already owned by the parties prior to marriage and states it shall continue to be held as separate property unless modified by later agreement. The deed was a later agreement.

Husband also cites to *In re Marriage of Grinius* (1985) 166 Cal.App.3d 1179. There, also, the premarital agreement provided the couple's separate property at the time of marriage would remain separate, and any property acquired as separate property during the marriage would be separate property. Although the court stated a premarital agreement would prevail over a contrary Family Law Act presumption, the court did not consider the facts we have before us.

III
Motion for New Trial

Husband claims the trial court abused its discretion when it denied his motion for a new trial. In addition to the arguments already raised, he claims (without authority) that the trial court should have granted the motion because the passage of time between the trial and the judgment made it difficult for

the court to enter a judgment faithful to the facts in evidence or to rule on the issue of transmutation.

The right to a new trial is purely statutory, and a court may grant a new trial only on one of the grounds listed in Code of Civil Procedure section 657. (*Fomco, Inc. v. Joe Maggio, Inc*. (1961) 55 Cal.2d 162, 166.) Husband raised two statutory grounds below: (1) irregularity in the proceedings consisting of misconduct by wife in failing to have the Galt property appraised and failing to disclose other assets; and (2) the decision was against the law. No claim was made below that the passage of time between the judgment and the trial dictated a new trial. Even if husband had made such a claim, it would not have been one of the grounds enumerated in the statute.

We have already addressed husband's claim the judgment was against the law. He does not claim on appeal the court erred in failing to grant a new trial because of wife's misconduct. Thus, any argument the new trial should have been granted on this ground is waived for failure to raise it in his opening brief. (*Gordon v. Law Offices of Aguirre & Mey*er (1999) 70 Cal.App.4th 972, 980, fn. 10.)

IV
Attorney Fees on Appeal

Wife requests that we award her attorney fees on appeal pursuant to section 271. Section 271 allows a court to award attorney fees and costs to the extent the conduct of the opposing party or attorney frustrates the policy of the law to

promote settlement of litigation. Such is appropriate when the appeal is frivolous. (*In re Marriage of Mason* (1996) 46 Cal.App.4th 1025, 1028.) We will do so.

Section 271, subdivision (a), provides "the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys."

On this record, consisting of the judgment roll, there can be no question the deed operated as a transmutation. It is composed of precisely the same language the court construed in *Estate of Bibb* when it held the language satisfied the "express declaration" language of section 852.

Husband failed to discuss *Bibb* in his opening brief even though he argued at length in the trial court on the motion that it did not apply. Then, when the respondent's brief called upon him to address *Bibb* he seized on a "distinction" that is not a "distinction" at all, that *Bibb* dealt with a probate proceeding. To this nondistinction he noted the following quote from Miller & Starr: "Nor does [the presumption] apply when the dispute arises in proceedings other than dissolution, such as a dispute by one spouse with the estate or an heir of the deceased spouse, or where there is an issue of the distribution of assets on the death of a spouse." (5 Miller & Starr, California Real Estate, *supra*, § 12:42, p. 101, fns. omitted.) What husband fails to

point out is the presumption there referred to is the presumption under section 2581, the community property presumption, not the "presumption" (if there is one) under section 852.

Husband either knew or should be charged with knowing the deed, on its face, operated as a transmutation of the property in the absence of extrinsic evidence that would prove it was not so intended. As to extrinsic evidence, husband acknowledges that on the judgment roll from the judgment filed March 13, 2001, based on the trial held August 21, 1998, there is no such evidence. The only record relevant to the trial is the husband's contrary assertion in his statement of issues and contentions that the subject property "became a community property home." Husband points to the earlier-in-time prenuptial agreement, but that agreement is clearly amended by the deed absent compelling evidence to the contrary and there is none.

As noted, husband did not appeal from the denial of his Code of Civil Procedure section 473 motion which contained a declaration in support of the motion. In it he asserts that wife knew the deed was not intended to convert the property to community property and that the bank required the joint deed before it would replace a construction loan with a mortgage. Whatever relevance these self serving assertions might have they are not before us. As noted, husband did not appeal from the denial of his section 473 motion.

We conclude the appeal is so utterly lacking in substance it is frivolous and, accordingly, attorney fees should be awarded to wife.

DISPOSITION

The judgment is affirmed. The trial court shall determine the amount of attorney fees that husband shall pay to wife. Costs on appeal are awarded to wife.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

HULL, J.